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No. ...-...

IN THE

Supreme Court of the United States

October Term, 1982

MONEX INTERNATIONAL, LTD.,
Petitioner,

vs.

COMMODITY FUTURES TRADING COMMISSION, *et al.*,
Respondents.

FIRST NATIONAL MONETARY CORPORATION,
Petitioner,

vs.

COMMODITY FUTURES TRADING COMMISSION, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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Questions Presented.

1. Whether in enforcing a vague statutory scheme a federal regulatory agency exceeds its authority by proceeding, not by rulemaking but by a quasi-criminal adjudication involving retroactive penalties, to change the law and establish rules having widespread application to an entire industry when the industry has justifiably relied on previous agency statements and actions.

2. Whether agency commencement of adjudication constitutes reviewable final agency action when the question is whether the agency has authority to proceed by adjudication rather than by rulemaking.

3. Whether considerations of finality limit a District Court's jurisdiction to enjoin undisputed agency violations of Constitutional and statutory rights.[1]

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[1]The parties in the Court of Appeals were Monex International, Ltd., First National Monetary Corporation, the Commodity Futures Trading Commission, its Chairman Philip McB. Johnson, its Commissioners James M. Stone, Susan M. Phillips, and David G. Gartner, and one of its administrative law judges, the Honorable George H. Painter. Pursuant to Rule 25(d)(1), Federal Rules of Civil Procedure, Commissioner Kalo A. Hineman is added herein as a party respondent.

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FIRST NATIONAL MONETARY CORPORATION,

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COMMODITY FUTURES TRADING COMMISSION, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioners Monex International, Ltd. ("Monex") and First National Monetary Corporation ("FNMC") respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on June 9, 1982.

I.
OPINIONS BELOW.

The opinion of the Court of Appeals (App. A, *infra*, 1-10) is reported at 677 F.2d 522. The transcript of the opinion of the District Court for the Eastern District of Michigan (App. B, *infra*, 11-28), rendered orally from the bench, was not reported. In addition, the March 31 (App. C, *infra*, 29) and June 9, 1982 (App. D, *infra*, 30-32) Orders of the Court of Appeals are included in the Appendix.

II.
JURISDICTION.

The judgment of the Court of Appeals for the Sixth Circuit was entered initially on May 3, 1982. A petition for rehearing was filed by Respondents (collectively referred to as "CFTC"), the *prevailing party*, on May 14, 1982. With a clarification of one word in the opinion, the mandate of the Court of Appeals issued on June 9, 1982. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

III.
STATEMENT OF THE CASE.

A. The Parties.

Petitioners Monex and FNMC are companies engaged in the business of buying and selling precious metals, principally gold and silver coins, from and to the public. They conduct business with their customers either for cash or on a "leverage" (credit) basis through various programs, including their respective "Forward" programs (App. A, *infra*, 2). Monex and FNMC operate in a manner somewhat akin to a retail store that allows "lay away" purchases and in no way resemble a traditional commodity exchange such as the Chicago Board of Trade.

Since 1975 leverage merchants, including Monex and FNMC, have been subject to the jurisdiction of the CFTC.

See 7 U.S.C. §23. Previously leverage contracts were regulated by the several states, often as securities.

Monex is the nation's largest leverage merchant of precious metals, followed by FNMC, and International Precious Metals Corporation. These three major firms make up the vast majority of the lawful leverage industry. A moratorium on new firms has been declared by the CFTC, but additional firms eventually will enter this business when the CFTC carries out the Congressional mandate to lift the moratorium. *See* S. Rep. No. 97-384, 97th Cong., 2d Sess. 52 (1982).

The economic importance of the leverage industry is substantial. Between them, Petitioners' volume of transactions exceeded $2.75 billion in 1980. They currently have a combined net worth of over $34 million, assets in excess of $564 million and employ over 500 individuals. Petitioners are major participants in world silver and gold markets because of the large volume of sales they make to the public and because of their large inventories and other positions in gold and silver.

The Respondents herein are the Commodity Futures Trading Commission, its Commissioners, and one of its administrative law judges, George H. Painter.

B. The CFTC Has Chosen to Adopt a New Rule of Law Having Widespread Application Through Adjudication Rather Than Rulemaking and Monex and FNMC Will Be Irreparably Harmed by This Choice.

To an unprecedented degree, this case strikes at the heart of the structure that governs the rights and obligations of administrative agencies, regulated industries, and the judiciary. At issue is the failure of the CFTC over its seven year existence to clarify by rulemaking infamously vague

statutory standards, and the capricious resort of the CFTC to an adjudication with disastrous economic consequences for those prosecuted in order to change the law applicable to an entire industry. Also at issue is the question of when the courts, as a matter of fundamental fairness, must intercede in the administrative process to check the arbitrary resort of administrators to adjudication, particularly when an adjudication is conducted in an egregiously unfair manner.

The CFTC was created to administer the Commodity Exchange Act ("CEA"), 7 U.S.C. §§1, et seq., through enactment of the Commodity Futures Trading Commission Act of 1974. The CEA recognizes at least three types of contracts calling for the later delivery of a commodity: (1) futures, (2) leverage, and (3) cash contracts. Each is subject to a differing degree of regulation under the CEA. Futures must be executed on an organized and licensed ("designated") exchange, termed a contract market. Leverage contracts are not executed on an exchange but are subject to regulation by the CFTC to ensure their financial solvency and to prevent manipulation or fraud. Cash contracts are outside the CFTC's jurisdiction.

Leverage contracts and cash contracts in many respects resemble futures contracts because all three provide for the later delivery of a commodity and involve the extension of credit or the deferred payment of the purchase price. However, Congress has made radically different provisions for their regulatory treatment. The difference significant to this case is that futures contracts must be traded on exchanges which have been designated by the CFTC as contract markets, and leverage transactions are exempt from this requirement. *Compare* Section 4h (7 U.S.C. §6h) with Section 19 (7 U.S.C. §23). Leverage transactions were exempted

by Congress because, *inter alia*, they cannot be traded on exchanges, a fact the CFTC has communicated to Congress.[2]

Considerable confusion has evolved as to the precise definitions of a futures contract and a leverage contract and the definitional dividing line between the two. Neither Congress nor the CFTC has ever made the distinction clear. The Court of Appeals herein noted that the difference between " 'futures,' 'margin,' 'leverage' and 'forward' contracts is unclear from both an economics and a legal point of view. . . ." (App. A, *infra*, 7). The undisputed evidence below established that the regulators (including present and former Commissioners, the CFTC's Chief Administrative Law Judge and its former acting Chief Economist) and those regulated (including the Chicago Board of Trade Clearing Corporation) do not have an accurate picture of the dividing line between these types of contracts. The CFTC's current Chairman told Congress that he cannot define a leverage contract (Hearings on S. 2109 before the Subcommittee on Agriculture Research and General Legislation of the Committee on Agriculture, Nutrition, and Forestry, 97th Cong., 2d Sess. 96 (1982)) and its former Chairman told Congress that the definition of a futures contract is unclear.

The undisputed evidence below also established that the CFTC has initiated but never completed several rulemaking efforts in this regard. Since the formation of the CFTC, leverage merchants have repeatedly sought advice from the CFTC as to the proper dividing line between futures and leverage contracts but no official guidance has been given.

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[2]Former Vice-Chairman John V. Rainbolt testified before the Subcommittee on Conservation and Credit of the House Committee on Agriculture that "To move leverage contracts onto exchanges will probably kill them." Hearings on H.R. 10285 Before the Subcomm. on Conservation and Credit of the House Comm. on Agriculture, 95th Cong., 2d Sess., at XIII (1978).

Rather than responding to industry rulemaking requests, on August 8, 1979 the CFTC filed administrative complaints alleging that the Monex "Forward" program and the similar FNMC "cash forward" program are illegal futures contracts in that they are not executed on a designated exchange. As an affirmative defense Monex and FNMC asserted that their programs constitute leverage contracts and are thereby exempt from any requirement that they be traded on such an exchange.

The administrative adjudication at issue here seeks to draw the dividing line between futures and leverage contracts for the first time and carries with it the probability of a devastating impact on Monex' and FNMC's businesses should any violation of the CEA be found.

It is undisputed that Petitioners' businesses are entirely dependent upon public confidence which would be devastated by the mere announcement of an adverse judgment. Thus, a cease and desist order alone will be a drastic penalty. Moreover, the CFTC seeks severe monetary and licensing sanctions against Monex and FNMC.

In view of the extreme consequences to Monex and FNMC, it is patently unfair for the CFTC to have determined to proceed in this instance by adjudication rather than rulemaking to clarify a vague statute. The unfairness of the administrative adjudication is also apparent in light of the prior misleading conduct of the CFTC.

Members of the commodities industry have been forced to rely since 1975 on the CFTC to fill in the gaps left by Congress in the CEA. The CFTC, however, has repeatedly failed to act by rulemaking, leaving law-abiding firms in a regulatory vacuum. Monex, FNMC and others have been forced to rely on CFTC pronouncements short of rulemaking to govern their business conduct.

Since 1975 and up until the filing of the administrative complaints the CFTC and its staff repeatedly indicated to Monex and (since 1977) to FNMC that it considered the transactions at issue here to be leverage transactions. Several published reports specifically described the Monex Forward as a leverage contract as did a decision of one of the CFTC's administrative law judges. A report prepared by the CFTC's Advisory Committee on Market Instruments contains a description of a leverage contract consistent with the Monex Forward.

Finally, in 1978 the CFTC broke its silence and announced its intention to ban by rulemaking all leverage programs on the basis that it could not tell the difference between leverage and futures transactions. This flaunted the Congressional directive, now thrice given, that the CFTC must regulate but cannot ban leverage transactions.[3] The adjudication against Monex and FNMC is part of this same attempt to ban leverage contracts (App. A, *infra*, 7-8),

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[3]The Senate Committee on Agriculture, Nutrition, and Forestry has recently reaffirmed this determination in the strongest terms:

> The Committee is seriously concerned, however, over the failure of the Commission to regulate leverage transactions after twice being directed to do so. The Conference Report for the Commission's 1978 reauthorization stated, 'It is the intent of the conferees that the Commission act expeditiously upon enactment of the conference substitute to regulate . . .' leverage transactions in gold and silver. (S. Rept. No. 95-1239, p. 28.) The Committee repeats its admonition and reemphasizes its intention for the Commission to regulate leverage transactions as expeditiously as possible. . . .
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> . . .
>
> . . . The Committee intends for the Commission to regulate leverage transactions, not to ban them. Again the Committee restates and clarifies the intention of the 1978 Conference Committee: the authority of section 19(d) is not to be misconstrued and exercised as a substitute for the regulation of leverage transactions. . . . S. Rep. No. 97-384, 97th Cong., 2d Sess. 52-53 (1982).

which the CFTC has publicly stated are not worth the trouble of regulating.

This case is about the CFTC's utter failure to provide definitional clarity, a clarity which must exist in some degree before the CFTC can be permitted to enforce, through substantial and retroactive quasi-criminal penalties, the statutory scheme. The CFTC has ignored express Congressional directives, has misled law-abiding members of the leverage industry and has allowed one of its administrative law judges, as the District Court found, to run roughshod over the Constitutional due process rights of Monex and FNMC.

C. Procedural History of the Case.

The suits below were instituted by Monex and FNMC seeking, in essence, (1) a declaratory judgment that certain provisions of the CEA are unconstitutionally vague, and (2) a preliminary and permanent injunction barring the CFTC from proceeding with an administrative adjudicatory hearing prior to engaging in rulemaking to define crucial terms in the CEA (App. B, *infra*, 12-13).

On December 17, 1981, after extensive briefing and oral argument, the Honorable Horace W. Gilmore of the United States District Court for the Eastern District of Michigan granted the preliminary injunction, rendering an oral opinion from the bench. The preliminary injunction restrained Respondents from proceeding with the administrative quasi-criminal hearing pending the definition of foundational terms in the CEA by a rulemaking procedure (App. B, *infra*, 23-24).

Previously, Judge Gilmore had issued a temporary restraining order at FNMC's request. Monex filed its suit in the United States District Court for the Central District of California and upon application to the Honorable A. Andrew Hauk, a temporary restraining order was issued. This latter

case was transferred to Judge Gilmore's docket after which the cases were consolidated for all purposes.

The quasi-criminal hearing was based on administrative complaints issued on August 8, 1979, which alleged that the Monex "Forward" program and FNMC's "cash forward" contracts were futures contracts not traded over a CFTC designated contract market (App. B, *infra*, 12). These complaints were issued despite the repeated requests by Petitioners for rulemaking in the leverage industry, despite the commencement by the CFTC of rulemaking proceedings concerning leverage transactions, and despite the numerous indications by the CFTC from and after 1975 that allowed Monex and FNMC to reasonably conclude that their activities were lawful (App. B, *infra*, 17). The administrative proceeding *involves no allegations of fraud, manipulation or other public harm.*

The administrative adjudication had been previously stayed for over eight months by the CFTC's own Chief Administrative Law Judge, who found that the lack of definitional clarity of the CEA could be remedied in a concurrently pending rulemaking proceeding. That stay was allowed to remain in effect for more than eight months by the CFTC although it had total discretion to vacate it at any time.

The District Court found (1) that Monex and FNMC were likely to prevail on the merits of their suits, (2) that Monex and FNMC would be irreparably harmed by the commencement of the administrative adjudicatory hearing, (3) that the CFTC would not be irreparably harmed and the public interest would in fact be served by the preliminary injunction, and (4) that the integrity of the administrative adjudicatory hearing was challenged by serious claims of due process

violations on the part of the CFTC, which claims were not controverted by the CFTC (App. B, *infra*, 20-28).[4]

Judge Gilmore found that the decision of the CFTC to proceed by adjudication rather than rulemaking, as evidenced by the filing of the administrative complaints, was final agency action which could be judicially reviewed in the context of a claim that the CFTC was exceeding and abusing its authority by adjudicating rather than rulemaking (App. B, *infra*, 14-20, 24). The District Court also found that the doctrine of exhaustion of administrative remedies did not preclude judicial review since further exhaustion would be a meaningless gesture (App. B, *infra*, 24).[5]

The District Court found that irreparable injury would occur to Monex' and FNMC's businesses in the absence of a preliminary injunction — injury which could not be remedied by the pyrrhic victory which might be achieved subsequently on appeal (App. B, *infra*, 25-27). As the Dis-

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[4]The District Court questioned whether Petitioners had received or would receive even the rudiments of due process at the hands of the agency:

> Serious allegations have been made in this case by plaintiffs with reference to the conduct and fairness of the administrative law judge assigned to this case. These were neither admitted nor denied by the defendant in oral argument and were not addressed in defendant's brief. The allegations are so serious that if true, they would raise a serious question as to the fairness of any hearing conducted in this case by the administrative law judge and a serious question as to whether the plaintiff has received or would receive due process at the hands of the administrative law judge, and I think it's particularly significant that there are many very serious allegations here which the defendant has chosen not to address and chosen merely to say it did not admit or deny. (App. B, *infra*, 25).

[5]In confirmation of the District Court's findings regarding rulemaking and exhaustion, the Administrative Law Judge ruled at the beginning of the administrative hearings in June that: (1) he would have preferred to have the issues presented handled in a rulemaking proceeding (App. E, *infra*, 33-34), but that he would deny a Motion to Dismiss based on that argument; and (2) he lacked "authority" to consider the Constitutional issues pressed before the District Court (App. F, *infra*, 35-36).

trict Court noted, the commodities industry is a highly volatile one, and public reputation is critical. The irreparable harm to Monex and FNMC from loss and damage to reputation and goodwill, loss of economic stability, loss of creditor confidence, and the unrecoverable loss of statutory and Constitutional rights, was regarded by the District Court as sufficient to warrant the granting of preliminary injunctive relief.

The importance of the role played by Monex and FNMC in the world gold and silver markets was also recognized by the District Court in granting a preliminary injunction pending an orderly, efficient and coherent process of rulemaking (App. B, *infra*, 27). Indeed, the District Court found that the public interest would be served by the preliminary injunction since an adverse decision in the administrative adjudication could have a serious and dangerous impact on the precious metals markets as a whole (App. B, *infra*, 25, 27).

On December 24, 1981, the CFTC applied to the United States Court of Appeals for the Sixth Circuit for an emergency stay of the preliminary injunction. On January 5, 1982, the CFTC filed an appeal of the District Court's written order granting the preliminary injunction.

On March 31, 1982, the Sixth Circuit Court of Appeals summarily vacated the preliminary injunction by an Order evidencing a lack of understanding of even the procedural aspects of the case,[6] and subsequently reversed the District Court's decision and factual findings on a legal ground derived from a misapplication of a prior opinion of this

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[6]This March 31, 1982 Order (App. C, *infra*, 29) purports to vacate a "stay of administrative proceedings pending appeal" entered by the District Court, although no such stay was entered, and does not mention even once the words "preliminary injunction."

Court (*FTC v. Standard Oil of California*, 449 U.S. 232 (1980) ("*Socal*")).[7]

The Court of Appeals recognized the fundamental vagueness of the statute under which Monex and FNMC were being prosecuted in a quasi-criminal proceeding. In its May 3, 1982 opinion, the Court stated that crucial terms of the CEA were "unclear from both an economics and a legal point of view" (App. A, *infra*, 7). Nevertheless, the Court held that the administrative adjudicatory hearing should proceed under the authority of this Court's decision in *Socal* because there was no reviewable final agency action (App. A, *infra*, 5-6). The decision of the Court of Appeals is in direct conflict with rulings by the Second, Seventh, Ninth, and District of Columbia Circuit Courts of Appeals.

On May 13, 1982, FNMC filed with the Court of Appeals a timely motion for stay of its mandate and the March 31, 1982 Order. Monex joined in FNMC's motion on May 24, 1982. On May 27, 1982, the Court of Appeals denied the motion for stay.[8]

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[7]After the issuance of the March 31, 1982 Order, the Respondent Administrative Law Judge scheduled the administrative hearing for June 14, 1982. The hearing was commenced on June 14, 1982, concluded on July 2, 1982 and post-hearing briefing is expected to be completed in November 1982. The issues raised in this Petition have not been rendered moot by the administrative hearing, as the administrative opinion will not issue until November or December at the earliest. Granting this Petition (and a stay pending its determination) will forestall the announcement of the decision, thus preventing the irremediable harm which would otherwise occur to Petitioners and the public.

[8]On June 1, 1982, Monex and FNMC applied to the Honorable Sandra Day O'Connor, Associate Justice of this Court, for a stay of the Court of Appeals' Mandate and March 31, 1982 Order. On June 9, 1982, Justice O'Connor denied the application. On the same day, Monex and FNMC sought to have their application for stay referred to Associate Justice William H. Rehnquist. Pursuant to this Court's practice, the application was referred to the full Court. On June 28, 1982, the Court denied Monex' and FNMC's application for a stay.

Conceding that the Court of Appeals' decision was incorrect, the CFTC, the *prevailing party* on appeal, filed a Petition for Rehearing on May 14, 1982, seeking the rewording of "incorrect assertions" in the opinion. By Order dated June 9, 1982, the opinion was clarified by substituting (App. A, *infra*, 3, line 30) the word "leverage" for the word "forward" (See App. D., *infra*, 30-31). The mandate of the Court of Appeals issued June 9, 1982 (App. D, *infra*, 32).

IV.
REASONS FOR GRANTING THE WRIT.

Petitioners submit that there are at least four issues which warrant the grant of a writ of certiorari in this case.

A. There Is a Conflict Among the Circuit Courts of Appeals on the Fundamental Issue of Whether an Administrative Agency May Be Required to Rulemake When Establishing New Law of Widespread Application.

The Courts of Appeals for the Sixth and Ninth Circuits have taken opposite positions on an issue of paramount importance to the entire scheme of administrative law. The Ninth Circuit held in *Patel v. INS*, 638 F.2d 1199 (9th Cir. 1980) ("*Patel*") and *Ford Motor Co. v. FTC*, 673 F.2d 1008 (9th Cir. 1982),* *petition for cert. filed* ("*Ford*") that agencies must proceed through rulemaking rather than by adjudication when an adjudication would enunciate new law or change existing law and have widespread application to

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*The Solicitor General has filed a Petition for Certiorari dated July 1982, seeking this Court's review of the holding of the Ninth Circuit in *Ford*. In the event a writ is issued in *Ford*, Petitioners urge the Court to grant certiorari herein and to consolidate this case with *Ford* for decision. At the very least, the Court should grant certiorari here pending a final decision in *Ford*.

an entire industry. In *Ford*, the FTC attempted by adjudication to impose on a car dealer a new rule regarding repossession practices. The Ninth Circuit reasoned that:

> [A]gencies can proceed by adjudication to enforce discrete violations of *existing* laws where the effective scope of the rule's impact will be relatively small; but an agency must proceed by rulemaking if it seeks to change the law and establish rules of widespread application. *Id.* at 1009 [emphasis in original].

Despite the rulings of the Ninth Circuit, and under factual circumstances[10] which made a favorable ruling even more compelling here, the Sixth Circuit held in this case that the agency was completely free to commence rulemaking proceedings to define central terms in the CEA, then to "change its mind" (App. A, *infra*, 7-8) and selectively prosecute two members of the leverage industry on charges which could not have been anticipated in the absence of such rulemaking. The Court came to this conclusion despite its explicit acknowledgment that crucial terms in the CEA, undefined by statute, are "unclear from both an economics and a legal point of view," and despite the fact that "it is clear that the agency must address serious policy questions in determining under what circumstances it should permit the type of off-exchange metals contracts at issue here."

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[10]In contrast to the *Ford* case, as presented in the Solicitor General's Petition, in the instant case, prior inconsistent and misleading actions on the part of the CFTC induced Monex' and FNMC's good faith reliance on the lawfulness of their conduct. In addition, no claim has been made that Monex' and FNMC's activities were fraudulent, unfair, or deceptive.

(App. A, *infra*, 7, 9).[11] It would be particularly appropriate to apply the *Ford* rationale where, as here, the adjudication involves a quasi-criminal hearing under a statute universally acknowledged to be vague.

This case is factually quite similar to *Ford* in that (1) new law having widespread impact on an entire industry will result from the adjudication,[12] (2) the agency has a concurrent rulemaking proceeding pending and (3) the agency has refused to permit full participation by those who will be affected by the new law.[13]

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[11]The Sixth Circuit purported to find Congressional authorization for the subject adjudication in the language of Section 19(b) of the CEA (7 U.S.C. §23(b)) permitting the CFTC to make "orders" regarding leverage contracts after notice and opportunity for hearing. The analysis is incorrect. In the first place, Respondents are not proper Petitioners under this section of the CEA. Second, and more importantly, the "orders" referred to in Section 19(b) are those "designed to ensure the financial solvency of the transaction or prevent manipulation or fraud." The administrative complaints herein contain no reference whatsoever to problems of financial solvency, manipulation or fraud. Finally, the legislative history which is set forth in the record below makes it clear that Congress intended for the CFTC to regulate the leverage industry, not adjudicate it out of existence. This issue will be fully developed in a brief on the merits if this Petition for Certiorari is granted.

[12]The CFTC's attempt to distinguish *Patel* and *Ford* on the ground that it is impossible for a court to determine whether the administrative adjudication in this case will change existing law or have widespread application, is ludicrous. Even the Sixth Circuit recognized that the subject adjudication involved the definition of crucial terms in the CEA and serious policymaking by the CFTC (App. A, *infra*, 7-9). The fact is that the administrative adjudication will define for the first time that fine line which the CFTC now seeks to draw between purportedly lawful and unlawful "leverage" contracts and between all leverage contracts and futures contracts. Such definitions will have widespread application to the entire commodities industry, including those entities excluded by the CFTC from the adjudicatory proceeding.

[13]In *Ford*, the Ninth Circuit noted that the FTC denied intervention to an association of car dealers despite the clear interest of the dealers in the new law regarding repossession practices. In the instant case, the CFTC has denied intervention to International Precious Metals Corporation, another sizable dealer in the leverage industry.

In the *Ford* Petition for Certiorari, the Solicitor General suggests that clear proof of an abuse of agency discretion might justify the *Ford* ruling, but argues that the *Ford* case did not present evidence of such abuse. Such abuse is evident here. The uncontroverted evidence presented to the District Court showed agency abuse of discretion in the form of improper motives, illegal ex parte contacts between the Commission and its administrative law judge and between that administrative law judge and the prosecutorial arm of the CFTC, lopsided discovery opportunities afforded to the prosecutor by the administrative law judge, agency attempts to subvert the Congressional mandate to regulate the leverage industry, and other matters.

Of equal importance here are the considerations attendant upon this Court's decision to grant or reject review of the *Ford* decision. In seeking this Court's review in *Ford*, the Solicitor General was asked to represent the CFTC's views with respect to that case (among other agencies) (Petition, p. 8). Highlighting the Sixth Circuit's stark conflict with the Ninth Circuit, as represented by this case, the Solicitor General emphasized that in *Ford*:

> The [FTC's] holding did not reverse any prior agency precedents on which [Francis Ford] might have relied, and the only consequence of the Order under review is prospective. (Petition, p. 19).

Here, there was uncontroverted evidence before the District Court of a total reversal of policy on the part of the CFTC (App. A, *infra*, 7-8), and it is beyond dispute that the CFTC's administrative adjudication involves retroactive consequences. This is the very situation conceded by the CFTC to exemplify agency abuse of discretion because it involves "some form of severe hardship or oppression to the party subject to the adjudication under challenge." (Brief *Amicus Curiae* of Federal Administrative Agencies

in Support of Petition for Rehearing and Suggestion for Rehearing *En Banc*, filed in *Ford*, at p. 4).

Similarly, the Solicitor General focused on the validity of the *Patel* holding, on which the *Ford* panel relied, by noting that:

> *Patel* involved an adjudication that was seemingly inconsistent with the regulation then in effect and that adopted a rule that the agency had recently decided not to issue after notice and argument. (Petition, p. 15).

The precise circumstances emphasized by the Solicitor General as justifying the *Patel* decision — proposed but aborted rulemaking followed by adjudication — were present in the case before the District Court herein. Even the Sixth Circuit recognized that such circumstances characterized the CFTC's handling of the futures/leverage definitional issue (App. A, *infra*, 7-8). However, despite its disavowance of judicial speculation, the Sixth Circuit attempted to avoid *Patel* by retreating to a rationale which had no support in the record, stating that the CFTC's reversal "may" have meant that the initial rulemaking efforts disclosed more "subtle and difficult" issues than were originally thought to be present (App. A, *infra*, 8). The District Court properly ignored any such rationale for avoiding the *Patel* decision.

The fact is that all of the elements supporting application of *Ford* and *Patel* in this case were present in the record before the District Court. All of the elements now identified by the government in the *Ford* Petition as potentially warranting the *Ford* and *Patel* results were also present in the record before the District Court. There was no basis in the

record or in law for the Sixth Circuit's refusal to follow *Patel* and *Ford*. The conflict is patent.[14]

The rulemaking issue raised by *Ford* and this case is of tremendous importance to the law governing administrative agencies, and there is a compelling need for a definitive opinion by this Court to ensure that the discretionary powers of administrative agencies will be safely exercised and confined by standards, principles and rules. The authorities, both academic[15] and judicial,[16] have stated that when rules of broad application are made by an administrative agency,

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[14]Interestingly, the Solicitor General also referenced with approval Professor Davis' analysis of *Ford* in which Davis emphasized the "combination" of (1) the superiority of rulemaking; (2) the pendency of rulemaking; and (3) the unfairness of singling out one car dealer while denying intervention to others (Petition, p. 18, citing the 1982 Supplement to Administrative Law Treatise, §7.25 at 183).

[15]Mayton, *The Legislative Resolution of the Rulemaking Versus Adjudication Problem in Agency Lawmaking*, 1980 Duke L.J. 103; Wright, *Beyond Discretionary Justice*, 81 Yale L.J. 575 (1972); Clagett, *Informal Action — Adjudication — Rulemaking: Some Recent Developments in Federal Administrative Law*, 1971 Duke L.J. 51; Boyer, *Alternatives to Administrative Trial-Type Hearings for Resolving Complex, Scientific, Economic and Social Issues*, 71 Mich.L.Rev. 111 (1972); K. Davis, *Discretionary Justice* (Baton Rouge, 1971); Robinson, *The Making of Administrative Policy: Another Look At Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U.Penn.L.Rev. 485 (1970); Baker, *Policy By Rule Or Ad Hoc Approach — Which Should It Be?*, 22 Law & Contemp. Prob. 658 (1967); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv.L.Rev. 921 (1965); Fuchs, *Agency Development of Policy Through Rulemaking*, 59 Nw.U.L.Rev. 781 (1965); Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 Harv.L.Rev. 863 (1962); Peck, *The Atrophied Rule-Making Powers of The National Labor Relations Board*, 70 Yale L.J. 729 (1961).

[16]*Ford Motor Co. v. FTC*, *supra*; *Patel v. INS*, *supra*; *Marshall v. Western Union Telegraph*, 621 F.2d 1246 (3d Cir. 1980); *National Nutritional Foods Association v. Weinberger*, 512 F.2d 688 (2d Cir. 1975) (Mansfield, J.); *NLRB v. Majestic Weaving Co.*, 355 F.2d 854 (2d Cir. 1966) (Friendly, J.); *cf. NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

that determination should be by rulemaking rather than by adjudication.

This Court's decision in *SEC v. Chenery Corp.*, 332 U.S. 194 (1947) ("*Chenery II*") established the criterion by which an administrative agency, which only has the authority to fill in the gaps of a statute and not to rewrite it, should proceed:

> The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future. *Id.* at 202.

Judicial intolerance of "rulemaking" by adjudication has often been evidenced. In *NLRB v. Majestic Weaving Co.*, 355 F.2d 854 (2d Cir. 1966), Judge Friendly wrote:

> There has been increasing expression of regret over the Board's failure to react more positively to the Supreme Court's rather pointed hint, [citing *Chenery* II], that since an administrative agency has 'the ability to make new law prospectively through the exercise of its rule-making powers, it has less reason [than a court] to rely upon *ad hoc* adjudication to formulate new standards of conduct,' and that *the 'function of filling in the interstices' of regulatory statutes 'should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future.'*
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> * * *
>
> *And the [judicial] hackles bristle still more when a financial penalty is assessed for action that might well have been avoided if the agency's changed disposition had been earlier made known, or might even have been taken in express reliance on the standard previously established.* [citations omitted] *Id.* at 860 (emphasis supplied).

Under the facts of this case, Monex, FNMC and others have repeatedly sought the advice of the CFTC, have urged the CFTC to rulemake, and have filed rulemaking petitions with the CFTC. The CFTC has failed, indeed refused, to articulate a regulation defining the most significant terms within its regulatory jurisdiction, *viz.*, "futures" or "contract for future delivery". The CFTC concedes that the public is not being harmed by any alleged violation by Monex and FNMC but that the alleged violation is a mere technical violation. The fact is that the CFTC finds the regulation of the leverage industry to be "not worth the trouble."[17] In these circumstances it would abuse all discretion to adjudicate. The retroactive impact will be substantial if Petitioners are declared "lawbreakers." *See Retail, Wholesale and Department Store Union v. NLRB*, 466 F.2d 380 (D.C. Cir. 1971) (retroactive effect denied on adjudicatory determination because the party to be punished had no notice of a change in established practice).

The industry as a whole, rather than the individual respondents, should be solicited for its views on the issue, and rulemaking rather than adjudication should take place. A decision by this Court can ensure that basic considerations of fairness prevail over unbridled abuse of administrative agency discretion. As stated almost twenty years ago by Chief Justice Burger, "Considerations of basic fairness require administrative regulations establishing standards" to govern relationships with the government. *Gonzalez v. Freeman*, 334 F.2d 570, 578 (D.C. Cir. 1964).

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[17]Former Vice-Chairman Rainbolt testified before Congress in 1978 that "[F]rankly, I think the judgment was made by the Commission that *leverage was not worth the trouble we were going through in trying to define it*. Therefore, I think we are coming back to you and asking you to take us off the hook." Hearings on H.R. 10285 before the Subcomm. on Conservation and Credit of the House Comm. on Agriculture, 95th Cong., 2d Sess. 656 (1978) (emphasis supplied).

B. There Is a Conflict Among the Circuit Courts of Appeals as to What Constitutes Reviewable Agency Action When the Authority of the Agency to Act Is Challenged.

The Sixth Circuit Court of Appeals held that a federal district court is without jurisdiction to determine a claim that an administrative agency is acting in excess of its authority (App. A, *infra*, 6-7). The Court of Appeals based its ruling on a supposed absence of reviewable final agency action, citing this Court's opinion in *Socal*.[18] The Court of Appeals has misconstrued the holding of *Socal*. *Socal* held only that the sufficiency of the "reason to believe" averments of an administrative complaint could not be reviewed prior to completion of the administrative proceeding. *Socal* does not prohibit judicial review of a claim that the agency is acting in excess of its authority by filing an administrative complaint. The Court of Appeals' decision directly conflicts with the holding of the Second Circuit Court of Appeals in *United States v. Cabrini Medical Center*, 639 F.2d 908 (2d

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[18]Throughout this action, the CFTC has urged the courts that the doctrine of exhaustion of administrative remedies also precludes judicial review of whether the agency has acted in excess of its statutory authority. Though not specifically addressed by the Court of Appeals, the District Court correctly held that the doctrine is inapplicable because further exhaustion would be "meaningless" (App. B, *infra*, 24). *See Touche Ross & Co. v. SEC*, 609 F.2d 570 (2d Cir. 1979) (exhaustion doctrine not applicable where validity of administrative proceeding has been challenged); *Finnerty v. Cowen*, 508 F.2d 979 (2d Cir. 1974) (exhaustion requirements dispensed with where administrative procedure under attack is the one which the agency says must be exhausted); *McKart v. United States*, 395 U.S. 185 (1969) (exhaustion not required where agency exceeded its jurisdiction); *PUC v. United States*, 355 U.S. 534 (1958) (no exhaustion necessary where fundamental Constitutional and statutory rights are being infringed); *Skinner & Eddy Corp. v. United States*, 249 U.S. 557 (1919) and *Jewel Companies, Inc. v. FTC*, 432 F.2d 1155 (7th Cir. 1970) (exhaustion not necessary where meaningful judicial review will effectively be foreclosed if the court does not intervene in the administrative proceeding).

Cir. 1981) ("*Cabrini*"). In *Cabrini*, the Second Circuit Court of Appeals held that when an agency is acting in excess of its authority, *Socal* presents no bar to judicial intervention. Thus, the institution of an investigation by an agency could be enjoined by the district court.

The Court of Appeals' decision also conflicts with an earlier ruling of the Second Circuit Court of Appeals in *Touche Ross & Co. v. SEC*, 609 F.2d 570 (2d Cir. 1979). In *Touche Ross* it was held that a claim of lack of agency authority to order an administrative proceeding could be judicially entertained since "further agency action is unnecessary" to determine the legal authorization of the agency to conduct the administrative proceeding. *Id.* at 577.

In addition to a conflict between the Sixth and Second Circuit Courts of Appeals on this issue, the Court of Appeals' holding in this case directly conflicts with the ruling of the Seventh Circuit Court of Appeals in *Jewel Companies, Inc. v. FTC*, 432 F.2d 1155 (7th Cir. 1970). In *Jewel*, it was held that injunctive relief was properly granted to restrain an agency from conducting proceedings pursuant to an administrative complaint when the issuance of the complaint was claimed to be in excess of statutory authority.

The reliance of the Sixth Circuit Court of Appeals on this Court's ruling in *Socal* also collides with the holding of the District of Columbia Circuit Court of Appeals in *Gulf Oil Corp. v. DOE*, 663 F.2d 296 (D.C. Cir. 1981). The District of Columbia Circuit Court of Appeals found that *Socal* did not preclude judicial intervention to review the procedural fairness of an ongoing adjudicatory proceeding.[19] Moreover,

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[19]In view of the claims of due process violations in this case, the decision of the Court of Appeals herein is also in direct conflict with the law as stated by the District of Columbia Circuit Court of Appeals in *Amos Treat & Co. v. SEC*, 306 F.2d 260 (D.C. Cir. 1962). *Amos Treat* holds that a district court has jurisdiction to entertain an action to enjoin an agency from prosecuting an unfair revocation proceeding *solely on due process grounds*, regardless of the usual procedures for judicial review of an agency's orders.

in *Reader's Digest Assn. v. Fed. Election Comm.*, 509 F.Supp. 1210 (S.D.N.Y. 1981), as in *Cabrini*, it was held that *Socal* was no bar to judicial review of the institution of an investigation by an agency.

It has never been the law that a federal court must stay its hand when a challenge is made to the very authority of an agency to act in a particular manner, or when it is claimed that an agency is acting illegally or without providing due process. The contrary holding of the Sixth Circuit Court of Appeals in this case presents a substantial ground for seeking review by this Court in a petition for certiorari.

Moreover, if *Ford* is affirmed by this Court, as it should be, its vitality would be gutted by requiring a party to undergo an administrative hearing prior to obtaining redress in federal court when that very hearing process is shown to threaten irreparable harm. Later reversal of an adverse agency decision on the basis of *Ford* would be a hollow victory indeed.

C. The Sixth Circuit Court of Appeals Has Decided Important Questions of Federal Law Which Have Not Been, but Should Be, Settled by This Court.

A further reason for seeking certiorari in this case is to enable this Court to determine important questions of federal law which have not been, but should be, settled by the Supreme Court. This case concerns (1) fundamental due process rights of a respondent in an administrative adjudicatory proceeding, (2) the proper application of this Court's decision in *Socal*, and (3) the important question of whether a presumptively illegal administrative adjudication can be interrupted by a federal court under the rulings of the Ninth Circuit Court of Appeals in *Patel* and *Ford*, when it has been demonstrated to the district court that a rulemaking

proceeding is the only legal alternative open to an administrative agency.

The Court of Appeals has summarily ruled on important issues which involve emerging legal standards of judicial review of agency action. The Court of Appeals completely ignored the District Court's findings (App. B, *infra*, 25-27) of due process violations and rejected with virtually no consideration the District Court's finding of irreparable harm, then mechanically applied the holding of *Socal* without examining, as the District Court did (App. B, *infra*, 14-20), this Court's rationale for the decision therein.

The Court of Appeals also appears to have held that the underlying vagueness of a comprehensive administrative statute is no bar to the institution of quasi-criminal proceedings under it, even when the agency itself cannot articulate the pertinent definitions. Such a decision is directly contrary to decisions of this Court setting forth the due process standards applicable to vague statutes. *See Connally v. General Construction Co.*, 269 U.S. 385 (1926). It is also directly contrary to previous rulings by the Court of Appeals. *See Diebold, Inc. v. Marshall*, 585 F.2d 1327 (6th Cir. 1978) (OSHA regulation void for vagueness as applied). It is crucial for this Court to determine the extent to which the Court of Appeals' decision in this case can abrogate such preexisting legal standards.

It is also important for this Court to resolve the issue of the extent to which the *Ford* and *Patel* decisions permit the halting of an administrative adjudication *before* it has resulted in a ruling, especially under circumstances such as these, where Monex and FNMC have made strong showings of irreparable harm, unfairness and statutory vagueness.

D. This Court Should Exercise Its Power of Supervision Over the Sixth Circuit Court of Appeals.

In its March 31, 1982 Order and June 9, 1982 opinion, the Court of Appeals departed so radically from the accepted and usual course of review of a lower court's order granting a preliminary injunction, as to call for an exercise of this Court's power of supervision over the actions of inferior courts. The Court of Appeals has flatly repudiated its own rulings that the granting or denial of a preliminary injunction will not be disturbed on appeal except under unusual circumstances, *NAACP v. Lansing Board of Education*, 485 F.2d 569 (6th Cir. 1973), and that a preliminary injunction is properly granted when the plaintiff "has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation," *Roth v. Bank of the Commonwealth*, 583 F.2d 527, 537 (6th Cir. 1978), *cert. dismissed*, 442 U.S. 925 (1979).

In addition, the Court of Appeals simply rejected out of hand the factual findings made by the District Court in granting the preliminary injunction. The careful analysis and balancing of interests performed by the District Court were regarded by the Court of Appeals as "clearly erroneous and wholly unsupported by the present record." (App. A, *infra*, 7).

The Court of Appeals' unwarranted substitution of its own judgment in place of the District Court's reasoned exercise of discretion, especially in light of the Court of Appeals' lack of understanding of the issues on appeal as evidenced by the March 31, 1982 Order, calls for the judicious exercise of this Court's power of supervision over the actions of inferior courts.

V.
CONCLUSION.

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

Respectfully submitted,

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